

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT

8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 OAKLAND DIVISION

10 J & J SPORTS PRODUCTIONS, INC.,

11 Case No: C 12-5784 SBA

12 Plaintiff,

**ORDER: OVERRULING
PLAINTIFF'S OBJECTIONS
TO REPORT AND
RECOMMENDATION OF
MAGISTRATE JUDGE;
ADOPTING REPORT AND
RECOMMENDATION AS
MODIFIED; AND GRANTING
MOTION FOR DEFAULT
JUDGMENT**

13 vs.

14 ALDO LOPEZ, individually and d/b/a
TAQUERIA AGUILILLIA,

15 Defendant.

16
17
18
19 Plaintiff J & J Sports Productions, Inc., filed this action against Aldo Lopez,
20 individually and dba Taqueria Aguilillia, inter alia, under the Communications Act of 1934
21 (“Communications Act”), 47 U.S.C. § 605, and the Cable & Television Consumer
22 Protection and Competition Act of 1992 (“Cable Act”), 47 U.S.C. § 553. On October 17,
23 2013, Magistrate Judge Joseph Spero (“the Magistrate”) issued a Report and
24 Recommendation in which he recommended granting Plaintiff’s Motion for Default
25 Judgment and awarding a total of \$7,200 in damages, an amount less than demanded by
26 Plaintiff.
27
28

1 The parties are presently before the Court on Plaintiff's Objections to the Report and
 2 Recommendation and related Motion for De Novo Determination Re Plaintiff's Motion for
 3 Default Judgment. Dkt. 39. Having read and considered the papers submitted, and the file
 4 as a whole, the Court, upon de novo review, OVERRULES Plaintiff's Objections and
 5 ADOPTS the Report and Recommendation, as modified below, and GRANTS Plaintiff's
 6 Motion for Default Judgment. The Court, in its discretion, adjudicates the instant matter
 7 without oral argument. Fed. R. Civ. P. 78(b); Civ. L.R. 7-1(b).

8 **I. BACKGROUND**

9 Plaintiff was previously granted commercial distribution rights to Manny Pacquiao
 10 v. Juan Manuel Marquez III WBO Welterweight Championship Fight Program ("the
 11 Program"), which was telecast nationwide on November 12, 2011. Compl. ¶¶ 3, 14, Dkt. 1.
 12 On that date, Defendant allegedly displayed the Program without authorization at his
 13 establishment, Taqueria Aguililla ("the Taqueria"), in Newark, California. Id.

14 On November 9, 2012, almost a year after the Program was broadcast, Plaintiff filed
 15 the instant action against Defendant alleging four claims for relief, as follows: (1) violation
 16 of the Communications Act, 47 U.S.C. § 605; (2) violation of the Cable Act, 47 U.S.C.
 17 § 553; (3) conversion; and (4) violation of California Business and Professions Code §
 18 17200. Defendant failed to respond to the Complaint and default was entered against him
 19 on June 13, 2012. Dkt. 25. Plaintiff thereafter filed a motion for default judgment, which
 20 the Court then referred to the Magistrate for a report and recommendation. Dkt. 27, 28.

21 Plaintiff's motion seeks a default judgment and the following damage award:
 22 A maximum award of \$10,000 in statutory damages and \$100,000 in enhanced damages
 23 under the Communications Act, § 605; a maximum \$60,000 award under the Cable Act,
 24 § 553; and an unspecified amount on the remaining claims. In support of his motion,
 25 Plaintiff submitted the affidavit of its "investigator," Horacio Martinez ("Martinez"), who
 26 states that he entered the Taqueria at 6:00 p.m. on November 12, 2011, after paying a \$15
 27 cover charge. Martinez Aff. at 1, Dkt. 28-3. Martinez states that during his forty-five
 28 minute visit, he observed the two televisions, at least one of which was showing a "fight

1 between Mike Alvarado (Blue Trunks) and Breidis Prescott (White Trunks)." *Id.* He
 2 indicated that the Taqueria has a capacity of ten people, and observed seventeen persons on
 3 the first head count and twenty-seven on the second. *Id.*¹ The affidavit does not state how
 4 many patrons were present when Martinez entered the Taqueria, whether patrons (other
 5 than himself) paid a cover charge, how many patrons were watching the Program and the
 6 Tacqueria's typical patronage on a Saturday evening in November.

7 On March 7, 2013, the Magistrate issued a Report and Recommendation Re Motion
 8 for Default Judgment. In his report, the Magistrate recommends granting Plaintiff's motion
 9 for default judgment, but denying Plaintiff's request for a maximum statutory and enhanced
 10 damage award under § 605 and § 553.² Instead, the Magistrate recommends, based on the
 11 facts presented, that Plaintiff's claims be construed solely under § 553 and awarding
 12 Plaintiff a total of \$7,200 in damages, allocated as follows: (1) \$2,800 in statutory
 13 damages; (2) \$2,200 in enhanced damages; and (3) \$2,200 in damages for conversion.

14 On October 31, 2013, Plaintiff filed objections to the Magistrate's recommendation
 15 to award Plaintiff \$2,800 in statutory damages and \$2,200 in enhanced statutory damages
 16 under § 553 on the grounds that such amounts are insufficient to further the Cable Act's
 17 goal of deterrence. Dkt. 38, 39. Rather, Plaintiff contends that it is entitled to the maximum
 18 amount of statutory damages (\$10,000) and the maximum amount of enhanced damages
 19 (\$50,000). Plaintiff does not challenge the Magistrate's proposed award of \$2,200 on the
 20 conversion claim.

21
 22
 23

24 ¹ These figures are questionable given the investigator's representation that the
 establishment's capacity is ten persons.

25 ² The Ninth Circuit recognizes that § 553 applies to cable television, while § 605
 26 applies to satellite television. See *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168
 27 F.3d 347, 349 n.1 (9th Cir. 1999). The Magistrate concluded that given the lack of
 28 evidence as to how the Program was transmitted, Plaintiff's claim should be construed
 solely under the Cable Act. Report at 6. Plaintiff does not object to the Magistrate's
 decision to construe his damage request under § 553 as opposed to § 605.

1 **II. LEGAL STANDARD**

2 A district court judge may refer a matter to a magistrate judge to conduct a hearing,
 3 including an evidentiary hearing, and to thereafter issue findings of fact and
 4 recommendations for the disposition of the matter. See 28 U.S.C. § 636(b)(1)(B), (C); Fed.
 5 R. Civ. P. 72(b)(1); Civ. L.R. 72-3. Within fourteen days of service of the proposed
 6 findings and recommendations, “any party may serve and file written objections to such
 7 proposed findings and recommendations as provided by rules of court.” 28 U.S.C.
 8 § 636(b)(1); see Fed. R. Civ. P 72(b). The district court must review de novo “those
 9 portions of the report or specified proposed findings or recommendations to which
 10 objection is made.” Fed. R. Civ. P 72(b)(1); see Holder v. Holder, 392 F.3d 1009, 1022
 11 (9th Cir. 2004). Factual findings are reviewed for clear error. Quinn v. Robinson, 783 F.2d
 12 776, 791 (9th Cir. 1986). The Court may “accept, reject, or modify, in whole or in part, the
 13 findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). In
 14 addition, the Court may consider further evidence or remand the matter to the magistrate
 15 judge with instructions. Id.

16 **III. DISCUSSION**

17 **A. STATUTORY DAMAGES**

18 Under the Cable Act, a party may be awarded statutory damages “in a sum of not
 19 less than \$250 or more than \$10,000 as the court considers just.” 47 U.S.C.
 20 § 553(c)(3)(A)(ii). In determining the appropriate amount of statutory damages, the court
 21 may consider the cost of the commercial license to exhibit the program at issue, the
 22 defendant’s incremental profit from the use of the program, the number of patrons at the
 23 establishment and the need to deter piracy. See Joe Hand Prods. v. Mujadidi, No. C 11-
 24 5570 EMC, 2012 WL 3537036, at *5 (N.D. Cal. Aug. 14, 2012); accord J & J Sports
 25 Prods., Inc. v. Napuri, No. C 10-4171 SBA, 2013 WL 1739520, at *2 (N.D. Cal. Apr. 22,
 26 2013) (citing cases).

27 In the instant case, Plaintiff objects to the Magistrate’s proposed statutory award on
 28 the grounds that it is insufficient to promote the policy goal of deterring piracy. This

1 contention lacks merit. The Magistrate appropriately took into account the goal of
 2 deterrence as a relevant consideration, along with the damages sustained by the Plaintiff
 3 and any incremental profit earned by the Defendant. Report at 7. In particular, he noted
 4 that the actual cost to license the Program was \$2,200, and that, at most, Defendant
 5 generated \$405 in cover charges that evening. Report at 8. Taking into account those two
 6 figures, the goal of furthering deterrence, and factoring in “some additional, incremental
 7 profits made by Defendant,” the Magistrate determined that an appropriate statutory
 8 damage award is \$2,800. Id. at 8.

9 Upon reviewing the matter de novo, the Court finds no merit to Plaintiff’s objections
 10 and concurs with the Magistrate’s analytical approach and his proposed statutory damage
 11 award. See Napuri, 2013 WL 1739520, at *2 (awarding \$2,200 in statutory damages based
 12 on the amount of the licensing fee); Mujadidi, 2012 WL 3537036, at *5 (“the Court
 13 concludes that an award of \$1,500 is appropriate, which is a rough approximation of the
 14 loss incurred by [plaintiff] (i.e., the licensing fee of \$900) plus some margin for profits
 15 earned by [defendant] from the event.”). The Court further finds that Plaintiff has
 16 presented no unusual or egregious circumstances to justify the imposition of a maximum
 17 statutory damage award of \$10,000. See Espinoza, 2013 WL 4520018, at *3 (“Granting the
 18 maximum statutory damages is inappropriate in the absence of unusual or egregious
 19 circumstances.”).

20 **B. ENHANCED DAMAGES**

21 When a court finds that a violation of § 553 “was committed willfully and for
 22 purposes of commercial advantage or private financial gain, the court, in its discretion, may
 23 increase the award of damages . . . by an amount of not more than \$50,000.” 47 U.S.C.
 24 § 553(c)(3)(B). “Because the Ninth Circuit has not provided guidance on how to determine
 25 ‘enhanced’ damages, district courts have taken into account a variety of factors, including
 26 the use of a cover charge, an increase in food price[s] during programming, the presence of
 27 advertisement[s], the number of patrons, the number of televisions used, the impact of the
 28 offender’s conduct on the claimant, and whether defendant is a repeat offender.” G & G

1 Closed Circuit Events, LLC v. Espinoza, No. C 12-6349 CRB, 2013 WL 4520018, at *4
 2 (N.D. Cal. Aug. 23, 2013).

3 As above, Plaintiff objects to the Magistrate's proposed enhanced damage award of
 4 \$2,200 as being too modest to deter piracy, and argues that the Court should instead award
 5 the statutory maximum of \$50,000. However, the facts of this case weigh against an award
 6 of enhanced damages, let alone a maximum award. The only colorable evidence that
 7 Defendant's action were for commercial gain is the investigator's claim in his affidavit that
 8 *he* was charged a \$15 cover fee. Although the investigator asserts that at some point up to
 9 twenty-seven people were present in the establishment, there is no evidence that any of
 10 those patrons actual paid a cover charge or that Defendant typically does not charge a cover
 11 fee on Saturday evenings. There also is no evidence that Defendant is a repeat offender,
 12 advertised the Program to the public, increased food or beverage prices, or that the number
 13 of patrons present exceeded the amount that would typically patronize the Taqueria on a
 14 Saturday evening in November.

15 In light of the deficient record presented, the Court rejects Plaintiff's contention that
 16 a maximum enhanced damage award is warranted. To the contrary, having reviewed the
 17 matter de novo, and taking into account Plaintiff's conclusory showing, the Court is
 18 persuaded that no enhanced damages should be awarded in this case. See, e.g., G & G
 19 Closed Circuit Events, LLC v. Castro, No. C 12-4649 WHA, 2013 WL 871913, at *3 (N.D.
 20 Cal. Mar. 7, 2013) (no enhanced damages awarded where there was no evidence that
 21 defendant profited from the exhibition of the pay-per-view fight); J & J Sports Prods., Inc.
 22 v. Parayno, No. C 12-2223 SI, 2012 WL 3277279, at *1 (N.D. Cal. Aug. 10, 2012) (no
 23 enhanced damage award where \$20 cover fee was charged and thirty patrons were present,
 24 but there was no evidence that the defendant advertised or profited from the exhibition);
 25 Universal Sports Network v. Jimenez, No. C 02-2768 SC, 2002 WL 31109707, at *1 (N.D.
 26 Cal. Sept. 18, 2002) (declining to award enhanced damages where plaintiff offered "only
 27 conclusory statements in support of its contentions that defendant realized personal gain
 28 from the match and that Plaintiff suffered great economic harm").

1 **C. CONVERSION**

2 Under California law, “to establish conversion, a plaintiff must show (1) his
 3 ownership of or right to possess the property at the time of the conversion, (2) that the
 4 defendant disposed of the plaintiff’s property rights or converted the property by a wrongful
 5 act, and (3) damages.” Bank of N.Y. v. Fremont Gen. Corp., 523 F.3d 902, 914 (9th
 6 Cir.2008). The damages for conversion are the value of the property at the time of the
 7 conversion and compensation for the time and money properly expended in pursuit of the
 8 converted property. Cal. Civ.Code. § 3336.

9 The Magistrate recommended awarding \$2,200 in conversion damages based on the
 10 cost of the license that Plaintiff would otherwise been required to pay for the Program,
 11 taking into account the capacity of the Taqueria. Although Plaintiff does not object to the
 12 Magistrate’s proposed conversion damages, the Court finds that no such damages should be
 13 awarded. Plaintiff is already being compensated for the cost of the license through the
 14 statutory damage award under § 553. Since Plaintiff has made no showing that an
 15 *additional* award is justified under the circumstances presented, the Court denies Plaintiff’s
 16 request for an award of damages for its conversion claim. See Parayno, 2012 WL 3277279,
 17 at *2 (declining to award conversion damages, finding that the statutory damage award
 18 under the Communications Act “sufficiently compensates plaintiff”).

19 **IV. CONCLUSION**

20 The Court has reviewed de novo the portions of the Magistrate’s report and
 21 recommendation to which Plaintiff has objected and concludes that Plaintiff’s objections
 22 are without merit. Accordingly,

23 **IT IS HEREBY ORDERED THAT:**

24 1. Plaintiff’s Motion for De Novo Determination Re Defendants’ Motion to Set
 25 Aside Entry of Default is GRANTED.

26 2. Upon de novo review of the Magistrate’s Report and Recommendation, the
 27 Court OVERRULES all of Plaintiff’s objections thereto. The Court ADOPTS the
 28

1 Magistrate's Report and Recommendation, which shall become the Order of the Court, as
2 modified above.

3 3. Plaintiff's Motion for Default Judgment is GRANTED. Judgment shall be
4 entered in favor of Plaintiff in the amount of \$2,800.

5 4. The Clerk shall terminate all pending matters and close the file.

6 IT IS SO ORDERED.

7 Dated: November 15, 2013


SAUNDRA BROWN ARMSTRONG
United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28